

UT 04-7

Tax Type: Use Tax

Issue: Nonresident Exemption

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS**

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS)	
)	
v.)	Docket No. 03-ST-0000
)	IBT # 0000-0000
JOHN DOE)	NTL # 00-00000000000000
)	
Taxpayer)	

RECOMMENDATION FOR DISPOSITION

Appearances: Kent Steinkamp, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Barry D. Dix of Barry D. Dix, Ltd. for John Doe.

Synopsis:

The Department of Revenue ("Department") conducted an audit of John Doe ("taxpayer") for the period of January 1996 through December 1998. At the conclusion of the audit, the Department determined that the taxpayer owed additional use tax on assets that were purchased for use for the taxpayer's business. On July 24, 2003, the Department issued a Notice of Tax Liability to the taxpayer for the additional tax, plus interest and penalties. The taxpayer timely protested the Notice. Prior to the hearing in this matter, the parties agreed that only one piece of equipment, which is an amusement ride known as the "Euro Scooter Ride," remains at issue. During the hearing the taxpayer

contended that the use tax does not apply to the purchase of this ride because it falls under the “nonresident exemption” of the Use Tax Act. After reviewing the record, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. The Department conducted an audit of the taxpayer for the time period of January 1996 through December 1998. (Tr. p. 8; Dept. Ex. #1)

2. The taxpayer’s accountant gave the auditor a depreciation schedule for the taxpayer’s individual federal tax return. At the top of the depreciation schedule, it states “Federal Asset Report Amusement Rides and Concessions.” (Dept. Ex. #4; Tr. p. 17)

3. On January 28, 1998, the taxpayer acquired a Euro Scooter Ride from Manufacturing, Inc. in Ohio. The taxpayer took possession of the ride at a trade show in Florida. The certificate of origin from Manufacturing, Inc. has the taxpayer’s name on it. (Taxpayer Ex. #1; Tr. pp. 26-27)

4. The State of Florida inspected the Euro Scooter Ride each time before it was operated there, and the first inspection was done on February 12, 1998. During 1998, the ride was inspected by the State of Florida on various dates between February 12, 1998 through April 23, 1998, and again from October 1, 1998 through November 19, 1998. The first page of the inspection report has “Doe Amusements” at the top of the page. (Taxpayer Ex. #2)

5. During the late spring and summer of 1998, the taxpayer operated the ride at various cities in Illinois. The taxpayer operated the ride at a carnival in Anywhere, Illinois that took place from May 5 through May 10, 1998. (Dept. Ex. #4; Tr. pp. 22-24, 32-33)

6. “Doe Amusements” operated its carnival in Illinois during spring and summer of 1996, 1997, 1998, and 1999. (Dept. Ex. #4)

7. The Euro Scooter Ride is licensed in Maine. The taxpayer’s name is on the registration. (Taxpayer Ex. #5; Tr. p. 39)

8. The taxpayer is not a shareholder of Doe Amusements, Inc. and has never owned any stock in the corporation. (Tr. p. 40)

9. The taxpayer did not pay use tax on the ride to another state. (Tr. p. 39)

10. On June 10, 2003, the Department prepared a corrected tax return for the taxpayer that shows additional use tax due in the amount of \$13,660, plus interest and penalties. A copy of the corrected return was admitted into evidence under the certificate of the Director of the Department. (Dept. Ex. #2)

CONCLUSIONS OF LAW:

Under the Use Tax Act (“Act”) (35 ILCS 105/1 *et seq.*), Illinois imposes a tax upon the privilege of using in Illinois tangible personal property purchased at retail from a retailer. 35 ILCS 105/3. The use tax is a corollary to the retailers’ occupation tax (“ROT”), which is a tax on persons engaged in the business of selling at retail tangible personal property. 35 ILCS 120/2. The use tax is imposed at the same rate as the ROT. 35 ILCS 105/3-10; 120/2-10. The purpose of the use tax is to prevent avoidance of the ROT by people who make purchases in states that do not impose the ROT and to protect Illinois merchants from the diversion of business to retailers outside Illinois. Brown’s Furniture, Inc. v. Wagner, 171 Ill.2d 410, 418 (1996). Credit is given for taxes paid to another state. 35 ILCS 105/3-55(d); 86 Ill.Admin.Code §150.310(a)(3). The use tax complements the ROT in that an Illinois retailer who collects the use tax as an agent of

the State is correspondingly relieved of his ROT liability on the transaction. Chicago Tribune Company v. Johnson, 119 Ill.App.3d 270, 273 (1st Dist. 1983). If the person who uses the property does not pay the use tax to the retailer, it must be paid directly to the Department. 35 ILCS 105/3-45.

Section 12 of the Act incorporates by reference section 4 of the Retailers' Occupation Tax Act ("ROTA") (35 ILCS 120/1 *et seq.*), which provides that the certified copy of the corrected return issued by the Department "shall be prima facie proof of the correctness of the amount of tax due, as shown therein." 35 ILCS 105/12; 120/4. Once the Department has established its prima facie case by submitting the certified copy of the corrected return into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. Clark Oil & Refining Corp. v. Johnson, 154 Ill.App.3d 773, 783 (1st Dist. 1987). To prove his case, a taxpayer must present more than his testimony denying the Department's assessment. Sprague v. Johnson, 195 Ill.App.3d 798, 804 (4th Dist. 1990). The taxpayer must present sufficient documentary evidence to support his claim. Id.

Section 3-70 of the Act provides an exemption from the use tax for nonresidents and states as follows:

Property acquired by nonresident. The tax imposed by this Act does not apply to the use, in this State, of tangible personal property that is acquired outside this State by a nonresident individual who then brings the property to this State for use here and who has used the property outside this State for at least 3 months before bringing the property to this State.

Where a business that is not operated in Illinois, but is operated in another State, is moved to Illinois or opens an office, plant, or other business facility in Illinois, that business shall not be taxed on its use, in Illinois, of used tangible personal property, other than items of tangible personal property that must be titled or registered with the State of Illinois or whose registration with the United States Government must be filed with the

State of Illinois, that the business bought outside Illinois and used outside Illinois in the operation of the business for at least 3 months before moving the used property to Illinois for use in this State.

"Acquired outside this State", whenever used in this Act, in addition to its usual and popular meaning, also means the delivery, outside Illinois, of tangible personal property that is purchased in this State and delivered from a point in this State to a point of delivery outside this State. 35 ILCS 105/3-70.

It is well-settled that tax exemption provisions are strictly construed in favor of taxation. Heller v. Fergus Ford, Inc., 59 Ill.2d 576, 579 (1975). The party claiming the exemption has the burden of clearly proving that it is entitled to the exemption, and all doubts are resolved in favor of taxation. Id. Every presumption is against the intention to exempt the property from taxation. Follett's Book & Supply Store, Inc. v. Isaacs, 27 Ill.2d 600, 606 (1963).

The taxpayer contends that the ride is exempt from use tax under the first paragraph of section 3-70. The taxpayer argues that the ride was acquired outside of Illinois by the taxpayer, who is a resident of Florida. The taxpayer states that he used the property for at least 3 months prior to bringing it into Illinois in May 1998, and therefore the ride should be exempt.

The Department argues that the first paragraph of section 3-70 does not apply because it only applies to property acquired by a "non-resident individual." The Department maintains that the taxpayer "purchased the ride as a business." (Dept. brief, p. 3) The Department states that the nature of the purchase was business, and the taxpayer intended to use the ride in Illinois for business. Because the taxpayer purchased and used the property as a business, not an individual, the Department contends that the property is not exempt under the first paragraph of section 3-70.

The Department asserts that the second paragraph in section 3-70 also does not apply because that paragraph only applies to a business “that is not operated in Illinois, but is operated in another State, [and] is moved to Illinois or opens an office, plant, or other business facility in Illinois.” See 35 ILCS 105/3-70. The Department claims that the taxpayer operated a business in Illinois prior to the acquisition of the ride. The Department argues that Mr. Doe was operating a sole proprietorship for amusement rides and concessions in Illinois, and that he operated in Illinois during 1996 and 1997. The Department contends that because the taxpayer was operating in Illinois when he purchased the ride, and he intended to use the ride in Illinois, the second paragraph of section 3-70 does not apply.

In response, the taxpayer states that the Department does not cite any authority that would characterize Mr. Doe as something other than an “individual.” The taxpayer notes that the Department’s regulation concerning this exemption (86 Ill.Admin.Code §150.315) does not purport to make the definition of “individual” that is proposed by the Department. The taxpayer states that the Notice of Tax Liability was issued to John Doe. The taxpayer maintains that absent any case, statute, or regulation that would indicate that John Doe is something other than an individual, the plain, ordinary, and common usage of that term must be used, and the first paragraph of section 3-70 applies.

The taxpayer argues that even assuming for argument sake that John Doe is not an individual but a business, the provision of the second paragraph of section 3-70 would apply to prohibit the imposition of the use tax. The taxpayer states that the evidence is undisputed that the property was used outside of Illinois for more than 3 months before it was brought into this State for use in this State. The taxpayer asserts that the

Department's interpretation of section 3-70 would render the 3-month provision of each of the first and second paragraphs superfluous because under the first paragraph, any business asset automatically keeps the taxpayer from being characterized as an individual, no matter how long he had and used the property outside of Illinois. Under the second paragraph, the taxpayer claims that according to the Department's interpretation, any operations in the State of Illinois at any time, whether it is a week, year, or three years, before bringing a business asset into the State of Illinois would render the 3-month provision meaningless.

The Illinois Supreme Court has stated that the emphasis in the paragraphs of the nonresident exemption is not on the form of the business entity involved. See Philco Corporation v. Department of Revenue, 40 Ill.2d 312, 326 (1968).¹ The court stated that “[t]here is no difference in the application of these provisions to the property of an individual and that of a corporation, nor is there a difference in their application to property used for individual enjoyment and that used for business purposes. The statutory emphasis is upon the fact that the property accompanies its owner and is brought to Illinois by its owner for his use here. Where the owner, whether a business or private individual, remains out of the State, the exemption does not apply.” Philco at 326.

In the present case, the taxpayer purchased the property while he was in Florida and remained there for at least three months before bringing the property into Illinois for use here. The relevant inquiry is not whether the taxpayer is an individual or business, but whether the taxpayer was a “nonresident” when he acquired the property. If the

¹ The court's analysis concerns the previous nonresident exemption provision, Ill.Rev.Stat. 1961, chap. 120, par. 439.3, which is substantially similar to the current provision.

taxpayer was not a resident of Illinois at the time of the purchase, then he would be entitled to the exemption.

Although the Use Tax Act does not provide a definition of “resident,” it is helpful to refer to the definition in the Illinois Income Tax Act (35 ILCS 5/101 *et seq.*), which provides in part as follows:

“[A]n individual (i) who is in this State for other than a temporary or transitory purpose during the taxable year; or (ii) who is domiciled in this State but is absent from the State for a temporary or transitory purpose during the taxable year;” 35 ILCS 5/1501(20)(A).

For income tax purposes, domicile is defined as the place where an individual has his true, fixed, permanent home; the place to which he intends to return whenever he is absent. (86 Ill.Admin.Code §100.3020(d)) “A person can have only one domicile or permanent residence and once it is established it is retained until a new domicile is acquired.” Hatcher v. Anders, 117 Ill.App.3d 236, 239 (2nd Dist. 1983). Determining whether an individual is in Illinois for a temporary or transitory purpose depends on the facts and circumstances of each case. (86 Ill.Admin.Code §100.3020(c))

In the present case, the taxpayer has failed to present sufficient evidence indicating that he was not a resident of Illinois at the time of the purchase. Although he testified that he has a residence in Florida, the taxpayer was asked the following question by his counsel during the hearing: “At anytime since January 1, 1998 have you owned a home in the State of Illinois?” His response was, “Yes.” (Tr. p. 26) The taxpayer purchased the ride on January 28, 1998, yet no additional questions were asked concerning his Illinois residence. He was never asked if he owned a home in Illinois prior to January 1, 1998, when he purchased the home, or whether he sold the home. It is not uncommon for Illinois residents to reside in Florida during the winter months.

Without any evidence concerning his Illinois residence, it is impossible to determine whether the taxpayer was in Illinois for a temporary or transitory purpose. The taxpayer admitted that he owned a home in Illinois during the time period prior to the purchase of the ride. With this admission, it cannot be found that the purchase qualifies for the exemption.

In addition, the taxpayer has failed to present sufficient evidence that his business was not operated in Illinois for purposes of the exemption. The Department provided a copy of the taxpayer's depreciation schedule, but the remainder of his individual tax return was not provided. The taxpayer did not give any evidence concerning the exact nature of his business, the name under which he operates his sole proprietorship, or his connection with Doe Amusements, Inc. The inspection report for the State of Florida shows the name of the business as "Doe Amusements." The Department provided "route" schedules for "Doe Amusements" that show that it operated at various towns throughout Illinois during 1996 through 1999. From this evidence, it is reasonable to conclude that the taxpayer does business as "Doe Amusements," and he operated his business in Illinois from 1996 through 1999. Because the taxpayer operated a business in Illinois at the time of the purchase, the Department properly assessed the use tax.

Recommendation:

For the foregoing reasons, it is recommended that the use tax on the purchase of the Euro Scooter Ride be upheld.

Linda Olivero
Administrative Law Judge

September 3, 2004